IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 222

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

STATE OF MINNESOTA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF OF APPELLANT.

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Opinions Below.

The first appeal was taken by the State of Minnesota, *State* v. *Illinois Central Railroad Company,* 200 Minn. 583, 274 N. W. 828. Rehearing denied—275 N. W. 854. Decision on second appeal, by the Illinois Central Railroad Company, 284 N. W. 360. Third appeal, by the company, resulted in judgment against it for $28,157.95 —286 N. W. 359.

Grounds on Which Jurisdiction Is Invoked.

The attack is on the construction and application of the Minnesota gross earnings statute, Sections 2246-2249, Mason's Minnesota Statutes 1927 (Appendix A.)

This court has jurisdiction under Section 237 of the Judicial Code as amended. (28 U. S. C., Section 344 (a).) The decision of the State Supreme Court sustained the statute.

It is contended:

1. To tax freight car per diem credits, where the freight receipts are already taxed, is a denial of the equal protection of the law, is an unreasonable burden on interstate commerce and takes property without due process of law.

2. To construe the statute so as to permit the application of the so-called "Burlington formula" is, when applied to appellant in the circumstances disclosed by the record, so arbitrary, capricious, unreasonable and discriminatory as to be a burden on interstate commerce, denies the equal protection of the law, and takes appellant's property without due process in violation of the Fourteenth Amendment.

3. To retroactively apply the formula in 1935 to transactions in 1922-29 violates the equal protection and due process clauses of the Fourteenth Amendment.

Statement of the Case.

This is an action brought in March, 1934, to recover taxes on alleged gross earnings for the years 1922 to 1929, inclusive. The earnings, which the state claims were omitted from the returns, were alleged car rentals consisting of freight car per diem credits arising from the interchange of freight cars between the Illinois Central Railroad Company and the other railroads operating in Minnesota.

The pertinent provisions of the statutes are:

> "*2246. Gross earnings*—Every railroad company owning or operating any line of railroad situated

within or partly within this state, shall, during the year 1913 and annually thereafter, pay into the treasury of the state, in lieu of all taxes, upon all property within this state owned or operated for railway purposes, by such company, including equipment, appurtenances, appendages and franchises thereof, a sum of money equal to five per cent of the gross earnings *derived from the operation of such line of railway within this state.*"

"*2247. 'Gross earnings' defined*—The term 'the gross earnings derived from the operation of such line of railway within this state,' as used in section 1 of this act is hereby declared and shall be construed to mean, all earnings on business beginning and ending within the state, and a proportion, *based upon the proportion of the mileage within the state* to the entire mileage over which such business is done, of earnings on all interstate business passing through, into or out of the state. ('12 c. 9 Sec. 2) (2227.)" (Italics ours.) (Appendix A.)

A Minnesota statute authorizes the Public Examiner to prescribe a formula or system of accounts:

"*Section 2239. Uniform system of accounting*—The public examiner, with the approval of the tax commission, shall have authority and power to prescribe for such companies, joint stock associations, co-partnerships, corporations, or individuals *a system of gross earnings accounts,* that shall be uniform for each class of companies, and he shall supervise the method of keeping such accounts; provided, that such system shall conform as nearly as practicable with that prescribed for such companies by the United States government. ('13 c. 487 Sec. 6 (2219.)" (Appendix B.)

Pursuant to these statutes, the state public examiner (now entitled Comptroller) with the approval of the State Tax Commission did prescribe, prior to the years in question (1922-9), the form which the various railroads were required to use in making their reports of gross earnings, to which the 5 per cent tax should be

applied. This form contained specific rules and instructions for making returns. (Ex. 2, Rec. 76A, offered 26.) The form and the rules and instructions were substantially the same throughout the eight-year period involved in this lawsuit. (R. 61.)

The Illinois Central Railroad Company made its annual reports to the Minnesota Tax Commission on this form and in compliance with the rules and instructions therein contained for each of the years in question. (R. 22, 23, 27, 61.) After these annual reports were made, the state sent auditors to the headquarters of the Illinois Central Railroad Company in Chicago and examined its books and records, and pursuant to such examination made certain claims for additional taxes. (R. 60.) This audit by the state corporate examiners and certification of balance due to the state treasurer was also specifically authorized by statute. (Sec. 3282, Appendix C.) The taxes shown to be due in the original reports together with the additional amounts claimed by the state after auditing the accounts and checking the records were paid in full by the railroad company. (Rec. 27; 60, 61.)

No records are kept of the number of days any car stays in any particular state. The rules of the Interstate Commerce Commission do not require the keeping of such records. The state of Minnesota has never required that such records be kept. Section 20 of the Interstate Commerce Act provides that the railroads shall keep no records except those required under the uniform system of accounting prescribed by the Interstate Commerce Commission. Furthermore it is wholly impracticable to keep such a record.

The instructions of the tax commission provided that such credit balances from hire of equipment should be

apportioned to Minnesota for taxation on the basis of the percentage of revenue freight car miles of the reporting company in Minnesota. The instructions prescribed by the state and followed by the company were (Ex. 2, R. 76A):

> "RENTALS FOR USE OF EQUIPMENT IN TRANSPORTATION SERVICE.
>
> 'The amount received by the company for its cars employed in transportation in excess of the amount paid out by it for the use of cars of other companies.'
>
> 'Where accounts are kept between different companies and charges are adjusted for such service, up to the point where accounts balance, the operation is a mere exchange of the use of the cars, but the amount received by any company for the use of its cars in excess of the amount paid out by it for the use of the cars of other companies is one of its sources of revenue earned by its rolling stock, and should be included in the gross earnings.'
>
> NOTE: You are to report to the State of Minnesota for taxation purposes, (a) the credit balance, if any, on freight equipment used in transportation service and interchanged with foreign roads on the per diem or mileage basis. Minnesota proportion of said credit balance to be computed by applying the percentage that the average revenue freight car mileage in Minnesota bears to the total average revenue freight car mileage of the entire line during the calendar year. (Ex. 2, R. 101.)"

Notwithstanding payment in full of the tax for the years in question (1922 to 1929) pursuant to the formula (Ex. 2, R. 76A) prescribed by state agency acting under legislative authority, (Sec. 2239) and payment of the certified balance after audit by the state's authorized (Sec. 3282) representatives, this suit was brought in 1934 to recover additional taxes computed under a new formula never before heard of. This for-

mula was so fantastic and unworkable that an attempt to explain it would serve but to confuse the issues. It may be ignored since it was abandoned by the state.

The first trial of this case resulted in a judgment for the state against the defendant in the sum of $12,866.50, on the basis of still another formula devised by the trial court.

The final judgment from which this appeal is taken was based on the so-called "Burlington formula", not pleaded, not prescribed by any agency of the state authorized to act, but which in 1935 was first injected into the case by the assistant attorney general in a motion for a new trial and amended findings of fact. (R. 105.) It arose in the compromise settlement of another lawsuit. (R. 97.) It was never adopted by the state prior to the institution of this suit. (R. 125, 126.)

The Burlington formula is substantially as follows:

Each reporting road is charged with that percentage of the credit balance with each other railroad operating in Minnesota in the account called "rentals from other lines for use of cars" as is determined by ascertaining the ratio of each *using* railroad's Minnesota revenue freight car miles bears to the system car miles of such using road.

Each reporting road is given credit for only such percentage of the debit balance with each other Minnesota railroad in the account called "payments to other lines for use of cars" as is determined by ascertaining the ratio of the *reporting* railroad's revenue freight car miles in Minnesota to its system car miles.

After thus apportioning the amount of credits and debits so computed, the net credits in excess of debits are ascertained and the statutory tax of 5 per cent applied to such net credits. (R. 105, 106.)

For example, Exhibit A (R. 87) shows that during the year 1922 the Illinois Central Railroad Company and the Minneapolis & St. Louis Railroad Company interchanged cars as a result of which there were gross per diem credits in favor of the Illinois Central of $193,691, partially offset by per diem debits, or rentals in favor of the Minneapolis & St. Louis of $84,521, making a credit balance in favor of the Illinois Central of $109,170. 32.42 per cent of the freight car miles of the Minneapolis & St. Louis Railroad during that year were in Minnesota. Under the Burlington formula, it is assumed that 32.42 per cent of the above mentioned credit balance from hire of freight cars accrued in the State of Minnesota, thereby producing as Minnesota proportion of credit balances in the amount of $35,292.88. Similar credit balances with other railroads were totaled to produce the total "Minnesota Proportion of Credit Balances" of $95,359. The same exhibit shows that during the year 1922 the Illinois Central interchanged cars with the Great Northern Railway by virtue of which the credits in favor of the Illinois Central amounted to $101,744, whereas the per diem rentals in favor of the Great Northern were $149,732, leaving a net balance in favor of the Great Northern of $47,988. During the year 1922 only eleven-hundredths of one per cent of the total revenue freight car miles of the Illinois Central System accrued in the State of Minnesota, therefore, it is assumed that only eleven-hundredths of one per cent of this debit balance of $47,988 accrued in Minnesota, thus giving the company credit for an offset of but $52.79. (Thus while the Illinois Central actually paid $47,988 to the Great Northern in 1922 for the use of Great Northern cars it, the Illinois Central, under the Burlington formula, was allowed credit for the payment of but $52.79 and would be taxed on a balance which did not exist, *i. e.*, on $101,744 less $52.79 or $101,691.21!) Similar very small debit bal-

ances or offsets were allowed as to other railroads and these added together produced a total debit balance of but $237. This amount, under the Burlington formula, is subtracted from the above mentioned total credit balance of $95,359, leaving net taxable rentals of $95,122, to which the gross earnings tax of 5 per cent was applied, producing a tax of $4,756.10.

The trial court overruled motions for amended findings of fact, whereupon an appeal was taken to the Supreme Court of Minnesota by both parties. The decision is reported in *State* v. *Illinois Central Railroad Company,* 200 Minn. 583, 274 N. W. 828, rehearing denied 275 N. W. 854.

The Supreme Court of Minnesota ignored the pleaded formula, ignored that prescribed by the public examiner and tax commission, ignored that devised by the trial court and remanded the case for the application of the Burlington formula subject to the pleaded constitutional objections, ruling on which was reserved.

The second trial court, pursuant to the decision of the supreme court, found that the additional tax under the Burlington formula amounted to $26,414.59 and with interest to $28,157.95. The constitutional objections were overruled.

The decision of the trial court was affirmed on appeals taken by both parties; *State* v. *Illinois Central,* 284 N. W. 360.

The case was remanded to the trial court for the formal entry of judgment, which was entered and a third appeal was taken by the Illinois Central Railroad Company in order to conclude the proceedings in the state court as a basis for the appeal to this court. The decision on the third appeal is reported in 286 N. W. 359.

The Court said:

"The errors assigned and urged on this appeal

were presented on the former appeal and the decision therein must be considered final so far as this court is concerned. It having been found that the Burlington formula for computing the tax on freight car per diem earnings was proper, and that the one proposed by defendant* 'is not a better formula than the Burlington', it follows that the tax computed according to the Burlington formula violates no provision of the constitution of this state, and we are unable to see that the 14th amendment or any other provision of the federal constitution is violated by the judgment rendered."

Specification of Errors.

The Supreme Court of Minnesota erred:

1. In affirming the judgment against the Illinois Central Railroad Company rendered by the District Court of Ramsey County, State of Minnesota, in the sum of $28,-157.93.

2. In construing the Minnesota gross earnings tax statute (Sections 2246-7, Mason's Minnesota Statutes 1927, page 544) so as to tax system rentals received for the hire of freight cars by one railroad company from another railroad company, thus resulting in double, discriminatory and unequal taxation in violation of the equal protection and due process clauses of the 14th Amendment of the Federal Constitution, and in a burden on interstate commerce in violation of the commerce clause of the Federal Constitution.

3. In construing the Minnesota gross earnings statute so as to permit the imposition of a tax on freight car per diem rentals of appellant's cars while on the lines of other railroads in transit in the course of interstate commerce, thus imposing a tax on personal property in

* Ascertain the system credit balance, if any, with all roads operating in Minnesota and allocate to Minnesota for taxation so much thereof as equals the percentage of the reporting road's loaded freight car miles (or miles of track as the state preferred) in the state. (R. 118.)

transit, which has no taxable situs in the state of Minnesota, thus resulting in an unreasonable burden on interstate commerce and a violation of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution.

4. In construing the Minnesota gross earnings tax statute as though the statute included therein the Burlington formula, although such formula is only a method of estimating freight car rentals and is so inaccuraate an approximation in lieu of the real facts that the imposition of the tax based thereon is the taking of appellant's property without due process in violation of the 14th Amendment to the Federal Constitution.

5. In construing the Minnesota gross earnings tax statute as though it included the Burlington formula, although a statute expressly authorized the state public examiner and the tax commission to prescribe a uniform system of accounting and a formula, and the said administrative agencies did prescribe a formula for computing appellant's taxes during all of the years 1922 to 1929, inclusive, which taxes were paid in full long before the Burlington formula was invented.

6. In construing the Minnesota gross earnings tax statute so as to permit the retroactive application of the Burlington formula in 1935 to the gross earnings for the years 1922 to 1929, inclusive, after reports had been made and taxes computed for those years in exact accordance with the rules and requirements of the administrative agencies during those years and without any opportunity on the part of the appellant to obtain and furnish information as to the exact car rentals accruing in Minnesota for that period.

7. In construing the Minnesota gross earnings tax statute so as to permit the application of the Burlington

formula in that its application produces such arbitrary, unreasonable and capricious results as between various railroads similarly situated as to take appellant's property without due process of law and deny appellant the equal protection of the laws guaranteed by the 14th Amendment to the Federal Constitution.

Summary of Argument.

First. The Minnesota gross earnings tax cannot be applied to the freight car per diem rentals since that would result in unequal and double taxation of the same property, a burden on interstate commerce, a denial of the equal protection of the law and the taking of property without due process of law. This is true whether the amount of such rental is determined accurately or estimated in accordance with a formula.

U. S. Express Co. v. *Minnesota,* 223 U. S. 335.

Cudahy Packing Co. v. *Minnesota,* 246 U. S. 450.

Railway Express Agency v. *Holm,* 180 Minn. 268, 239 N. W. 815.

Galveston, etc. R. R. Co. v. *Texas,* 210 U. S. 217, 227.

Oklahoma v. *Wells Fargo & Co.,* 223 U. S. 298.

State v. *St. Paul M. & M. R. R. Co.,* 30 Minn. 311, 15 N. W. 307.

State v. *Northern Pacific Ry. Co.,* 32 Minn. 294, 20 N. W. 234.

State v. *St. Paul Union Depot,* 42 Minn. 142, 43 N. W. 840.

Hopkins v. *Southern California Telephone Co.,* 275 U. S. 393.

State v. *M. & I. Railway Co.,* 106 Minn. 176, 118 N. W. 679, 1007, 16 Ann. Cas. 426.

C. C. C. & St. L. Ry. Co. v. *Backus,* 154 U. S. 439, 445.

Second. The construction of the statute so as to permit the application of the so-called "Burlington formula" is so discriminatory, capricious and unreasonable as to violate the equal protection, due process and commerce clauses of the Federal Constitution.

> *Hans Rees' Sons* v. *North Carolina,* 283 U. S. 123, 134, 135.
>
> *Southern Ry. Co.* v. *Kentucky,* 274 U. S. 76, 80.
>
> *Shaffer* v. *Carter,* 252 U. S. 37, 52, 53, 57.
>
> *Oklahoma* v. *Wells Fargo & Co.,* 223 U. S. 298.
>
> *Hopkins* v. *Southern California Telephone Co.,* 275 U. S. 393, 402.
>
> *Wallace* v. *Hines,* 253 U. S. 66, 69.
>
> *Union Tank Line Co.* v. *Wright,* 249 U. S. 275, 283.

Third. Where the gross earnings tax has been paid strictly in accordance with a formula or system of gross earnings accounts prescribed by an administrative agency of the state acting under legislative authority, and where the accounts were subsequently audited by an agency of the state also acting under legislative authority, and the small additional amount found due was certified to the state auditor and paid to the state treasurer, the imposition of an additional tax pursuant to the retroactive application of a newly invented formula, is so arbitrary and unreasonable as to violate the equal protection and due process clauses of the Fourteenth Amendment.

> Section 2239, Mason's Minnesota Statutes 1927, page 544.
>
> Section 3282, Mason's Minnesota Statutes 1927, page 755.
>
> See also cases under points 2 and 4.

Fourth. The construction of the statute so as to permit the retroactive application in 1935 of a formula under which a part of the freight car per diem rentals in 1922 to 1929 inclusive, are allocated to the State of Minnesota for taxation, exceeds the limit of permissible retroactivity.

Welch v. *Henry,* 305 U. S. 134, 59 S. Ct. 121.

Nichols v. *Coolidge,* 274 U. S. 531.

Blodgett v. *Holden,* 275 U. S. 142.

Untermeyer v. *Anderson,* 276 U. S. 440.

People v. *Graves,* 21 N. E. (2d) 371.

State v. *Western Union Telephone Company,* 111 Minn. 21.

Gray v. *City of St. Paul,* 105 Minn. 19.

Fifth. A "statute of any state," decision concerning the constitutionality of which may be reviewed on appeal, is not limited to enactments of the State legislature, but includes every act, legislative in character, to which the State gives the force of law, such ~~as an~~ order of a State tax commission, or the decision of a court substituting its choice of a formula for that prescribed by the commission.

King Mfg. Co. v. *City Council of Augusta* (1928), 277 U. S. 100, 48 S. Ct. 489, 72 L. Ed. 801.

Live Oak Water Users' Ass'n v. *Railroad Commission of State of California* (1926), 269 U. S. 354, 46 S. Ct. 149, 70 L. Ed. 305.

Hamilton v. *Regents of University of California* (1934), 293 U. S. 245, 55 S. Ct. 197, 79 L. Ed. 343.

Lake Erie & Western R. R. Co. v. *State Public Commission ex rel. Cameron,* 249 U. S. 422-4.

Sultan Ry. Co. v. *Dept. of Labor,* 277 U. S. 135.

ARGUMENT.

I.

The Supreme Court of Minnesota Erred in Construing the Minnesota Gross Earnings Tax Statute so as to Permit the Application of the Tax to Rentals Received for the Hire of Freight Cars by One Railroad Company from Another Railroad Company, Thus Resulting in Double, Discriminatory and Unequal Taxation in Violation of the Equal Protection and Due Process Clauses of the 14th Amendment and in a Burden on Interstate Commerce in Violation of the Commerce Clause of the Federal Constitution.

This case involves the fundamental question whether the Minnesota gross earnings tax of five per cent can be applied to the rentals received by a railroad company for the hire of freight cars leased to and used by another railroad company in Minnesota.

The state's claim in this case is a tax at the rate of 5 per cent for "rentals from other lines for use of cars", as shown by the plaintiff's motion for amended findings, etc. Exhibit "A" (Rec. 86).

The amount of the said rentals alleged to be taxable in Minnesota is now calculated according to the Burlington formula. Its attempted use in this case is confusing for many reasons, as will be shown, but it cannot obscure the basic question whether the state of Minnesota has the right to apply its five per cent gross earnings tax to rentals alleged to have been received by the Illinois Central Railroad Company from other railroads operating in

the state of Minnesota on account of the use of Illinois Central freight cars on such other railroads in the course of interstate commerce. If such rentals cannot be taxed, it will be unnecessary to consider whether the Burlington formula is a reasonable method of estimating the amount of such rentals nor whether it can be applied in 1935 retroactively to the years 1922 to 1929.

To illustrate, it may be assumed that appellant accepted a carload shipment of freight consigned from Chicago to St. Paul, and had hauled the same along its lines to the interchange point at Albert Lea, Minn., and there delivered it to the M. & St. L. Railroad Company, which hauled it to St. Paul, delivered it to the consignee and returned the car, loaded or empty, to the Illinois Central. Assuming that the Illinois Central car was in the possession of the M. & St. L. for a period of ten days, there would accrue to the Illinois Central interchange per diem credits amounting to $1.00 per day, or a total of $10.00. Under the contentions of the state in this suit, the state would be claiming a tax of 5 per cent, or 50 cents, on such alleged car rentals, or per diem credits. Admittedly, the state would have already imposed its 5 per cent tax on the freight charges collected from the shipper or consignee for hauling the shipment, such charges being based on the mileage proportion of the movement in Minnesota. Let us now consider whether the state has the right to collect an additional tax on the alleged car rentals, or per diem credits.

The Minnesota gross earnings method of taxation has been construed to be a property tax.

> *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335.
> *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450.
> *Railway Express Agency* v. *Holm*, 180 Minn. 268, 239 N. W. 815.

It is expressly stated in the statute that it is in lieu of all other taxes. Otherwise, it would be a burden on interstate commerce, and therefore unconstitutional.

Galveston, etc. R. R. Co. v. *Texas*, 210 U. S. 217, 227.

Oklahoma v. *Wells Fargo & Co.*, 223 U. S. 298.

Since it is a property tax, it is necessarily a tax on all the property used to produce the earnings, regardless of the ownership of such property. Such property would include cars, railroad tracks, depots, and all other railroad property, whether owned or leased. If the tax be applied to the rentals received by the owner as well as the earnings received by the lessee for the use of the property, there is double taxation.

This has been clearly held by the Minnesota Supreme Court in *State v. St. Paul M. & M. Railroad Company*, 30 Minn. 311, 15 N. W. 307. In that case the Minnesota Supreme Court condemned an attempt by the state to include a $40,000.00 annual track rental received by the St. Paul M. & M. Railway Company from the Northern Pacific Railway Company for the use of the former's track. The Court was careful to point out that the state was limited to gross income derived from operations and the Northern Pacific Railway was the company which actually operated the rented line and that, since the state had already included the income derived by the Northern Pacific from the operation of this rented line, it would be double taxation to include the rental paid the owning company. A portion of the opinion follows:

> "* * * Rent or compensation paid to the company for the right to operate the railroad cannot be called receipts on account of the operation of it. The company might not operate its railroad at all, but lease it for a gross sum, in which case all the receipts on account of the operation of the railroad

would go into the hands of the lessee, and the rent only (which would probably be regulated by the expectancy of net earnings) into the hands of the company. And in such case exacting 3 per centum upon the rent paid the company and also upon the receipts by the tenant earned by operating the railroad, would be, to the extent of the rent, in the nature of double taxation, or rather of exacting twice the commutation for taxes on the same property. Leasing or selling the railroad cannot affect the rights of the state. Into whose hands soever the railroad may pass, and whoever may receive the gross earnings, the obligation to pay and the right to receive the 3 per centum on such gross earnings are unimpaired. Such earnings still furnish the measure of such obligation and right."

In *State* v. *Northern Pacific Railway Company,* 32 Minn. 294, 20 N. W. 234, the principle announced in the foregoing case was again approved and applied—the Court saying:

"In *State* v. *St. Paul M & M Ry. Co.,* 30 Minn. 311, S. C. 15 N. W. Rep. 307, the term 'gross earnings,' in the foregoing quotation, was held to include, not rents received for the right to operate the railroads, but only sums earned by operation, and that leasing or selling the railroad cannot affect the rights of the state; and into whosoever hands it may pass, and whoever may receive the gross earnings, the obligation to pay, and the right of the state to receive the 3 per centum on such gross earnings are unimpaired, and they still furnish the measure of such obligation and right."

In *State* v. *St. Paul Union Depot,* 42 Minn. 142, 43 N. W. 840, it was held the income derived by the St. Paul Union Depot Co. on account of terminal passenger services performed by that company need not be returned as gross income for the purposes of taxation because the passenger transportation charges of the railroad companies using the depot included the depot company's services. The court pointed out that since the passenger transportation

charges included the cost of using the St. Paul Union Depot it would be double taxation if the rentals received by the Depot Company were taxed as well as the transportation income received by the using lines.

A portion of the opinion follows:

"* * * if a passenger on one of these roads pays his fare from Chicago to St. Paul, this covers the entire transit between the two cities, including the accommodations of the Union Depot. Hence, for all the facilities furnished by the defendant to the railroad companies, and for which it charges them their respective shares of the cost, the railway companies charge their patrons as part of their service, and the whole goes into and forms a part of their gross earnings, upon which they pay to the state as taxes a certain percentage. All of the railway companies who use this Union Depot pay to the state, either under the provisions of their special charters, or under the act of March 10, 1873, a percentage on their gross earnings in lieu of taxes on all property held and used by them for railway purposes.

"It is evident from this statement of facts that the sole and only function performed by the defendant corporation is to furnish, at cost, a union depot and terminal facilities for the common use of these different railway companies, and that the scheme of forming a corporation for that purpose, and issuing stock, is but a more convenient and economical method of holding the property and managing the business than it would be to hold and manage it as tenants in common. It is also apparent that what is charged the railway companies and received by the depot company for these terminal facilities is nothing more or less than a part of the expenses of the former in transacting their railway business, and that what are called the 'earnings' of the depot company are for services for which the railway companies charge their patrons, and are all included in the gross earnings of the companies, on which they pay a percentage to the state. To collect a percentage on these gross earnings, and also a percentage on the gross earnings of the depot company, would be, *pro tanto,* double taxation of the same thing."

When the Gross Earnings of Leased Property Have Been Taxed, Such Property Cannot Again Be Taxed.

In *Hopkins* v. *Southern California Telephone Company*, 275 U. S. 393, the United States Supreme Court had under consideration the gross earnings tax law of California applicable to telephone companies, which, as to its basic principles and in its material provisions, was substantially the same as the gross earnings tax laws of Minnesota now under discussion. The Southern California Telephone Company was an operating company and paid the gross earnings tax prescribed by law as being in lieu of all other taxes on its property. It owned the telephone system except that among the various items of property devoted to the operation thereof, it had under lease from the American Telephone & Telegraph Company the usual telephone instruments or talking sets consisting of the receiver, transmitter and induction coil. The taxing authorities attempted to tax the telephone instruments so leased on the theory that being the property of the American Telephone & Telegraph Company, and not that of the operating company which paid the gross earnings tax, they were taxable as the property of the American Telephone & Telegraph Company under the laws applicable to taxation of tangible personal property generally. The position of the state taxing authorities was that since the gross earnings tax was a communted tax on the property of the Southern California Telephone Company it was not in lieu of taxes upon leased property belonging to another company not paying such a gross earnings tax. The position of the Telephone Company was that all the property, *both owned and leased*, was what had produced the earnings, and hence that the commuted tax was on property which included that which was leased as well as that which was owned. The United States Supreme Court,

after pointing out that the operating company had not deducted from gross earnings the rental paid for the talking sets, showed the inequality that would result if the State were allowed to tax the sets, and held that to avoid "very serious questions under the Federal Constitution" the statute must be construed as not subjecting the leased sets to local taxation. In so doing the Court said (p. 402):

> "The state received from respondents a sum equal to five and one-half per centum of the gross revenues derived from all operating property under their control-leased as well as owned. These did not depend upon ownership; and rent paid out was not considered.
>
> "If payment of the prescribed part of the gross receipts only relieves from local taxation property actually owned and leaves all held under lease subject thereto, inequalities with possible confiscation, would certainly result. Under that theory a corporation with title to half (in value) of its operative property, the remainder being leased, would really pay on account of the portion owned at twice the rate required of another corporation operating the same amount of property and having equal receipts, but holding nothing by lease. And if the ratio between property owned and leased were less, the difference in rate would be still greater. A telephone company which leased everything it used would release no property from taxation by paying the gross receipts tax, while the competitor with equal receipts, by paying the same amount, might absolve from local assessment property of very large value.
>
> "These difficulties cannot be avoided by saying the lessee will not pay assessments against the lessor and therefore cannot complain. Leases are commonly made with reference to taxation. When the lessor discharges the tax the lessee pays rent accordingly. And the Fourteenth Amendment protects those within the same class against unequal taxation; all are entitled to like treatment.
>
> "Here respondents have surrendered out of gross receipts the equivalent of the burden imposed upon other property not less valuable than all the operating property in their systems; and now, unless more is paid, disruption is threatened through seizure and sale

of essential instrumentalities actually employed to produce those receipts.

"We think the purpose of the 1910 amendment is to tax all operating property of a telephone company by ascertaining the gross receipts, and taking therefrom the specified percentage. Thus, the imposition becomes approximately equal to what other property bears. Unless the gross receipts tax be so treated, some very serious questions under the federal constitution are almost certain to arise. Without an authoritative holding by the State Supreme Court to the contrary, we must conclude the leased speaking sets are not subject to local taxation."

Hopkins v. *Southern California Telephone Company* was cited with approval by the Supreme Court of Minnesota in *Railway Express Agency* v. *Holm*, 180 Minn. 268, 239 N. W. 815.

The Court said:

"Our conception of the gross earnings tax is that it is aimed at the business to which it is applicable considered as a whole and embracing all property used therein (citing cases), and also that the gross earnings tax is inconsistent with any other form of taxation (citing *Hopkins* v. *So. California Telephone Company*, 275 U. S. 393), and that unity of purpose is the foundation for the imposition of such commuted tax; that plaintiff's motor vehicles are used exclusively in its business; that the gross earnings tax is necessarily a tax upon such motor vehicles and the imposition of the motor registration tax would subject the motor vehicles to two taxes."

Strange as it may seem, the state courts in their opinions in the present case have ignored the fact that their ruling herein conflicts with the cited earlier decisions, Yet, it seems clear that while said decisions for the most part involve rentals from real estate or tracks owned by one railroad and used by another, there is not the slightest reason for making a distinctiion between rentals received for freight cars owned by one railroad company and used by another railroad company in Minnesota, and rentals of real estate or tracks similarly leased.

First Attempt to Apply Gross Earnings Tax to Car Interchange Per Diem Credits.

The first attempt of the State administrative authorities to apply the gross earnings tax to car rentals received by a railroad company for the use of its cars by another railroad company in Minnesota was that involved in the case of *State* v. *M. & I. Railway Co.*, 106 Minn. 176, 118 N. W. 679, 1007, 16 Ann. Cas. 426, decided November 27, 1908. That case involved a consideration of the application of the Minnesota railroad gross earnings tax to the item "Hire of Equipment, Credit Balance" as reported by the railroad company to the Interstate Commerce Commission under the uniform system of accounting prescribed by the Interstate Commerce Commission. Under that system of accounting the net result of the interchange of cars by any railroad company with all other railroad companies is thrown into one account and the net result is shown as a credit balance or a debit balance. The ruling of the State Supreme Court upon this point was as follows:

> "Upon this question we accept the views of the Supreme Court of Wisconsin in the case of *State ex rel. Abbot* v. *McFetridge, supra.* Where accounts are kept between different companies and charges are adjusted for such service, up to the point where the accounts balance, the operation is a mere exchange of the use of the cars, but the amount received by any company for the use of its cars in excess of the amount paid out by it for the use of the cars of other companies is one of its sources of revenue earned by its rolling stock, and should be included in the gross earnings."

Beginning in 1908, the tax administrative authorities of the state of Minnesota promulgated their ruling (which was faithfully complied with by appellant in the present case), that a balance should first be made between the reporting railroad on the one hand and all other railroads on the other, and where such balances resulted in a net credit from the interchange of freight cars a proportion of such net credit equal to the proportion of the *reporting* road's mileage in the state should be taxable in Minnesota. The ruling promulgated in 1908 and in force all through the period 1922 to 1929 was that the Minnesota gross earnings tax would be applied to a proportion of such net credit balances based on the *reporting* railroad's freight car mileage in Minnesota as compared to the *reporting* railroad's total freight car miles. Under this ruling, appellant reported and paid the taxes on approximately one-tenth of one per cent of its hire of equipment credit balances.

While the appellant acquiesced in said ruling by the state tax commission and reported its hire of equipment credit balances, to Minnesota and paid the five per cent tax on the Minnesota proportion thereof, such reports and payments were made only because such taxes computed under the formula promulgated in 1908 were so small as to be negligible. The appellant had credit balances for its hire of equipment in only one year out of the eight here involved, and such balances were small and the proportion thereof reported to Minnesota on which taxes were paid was based on the appellant's own mileage within the state of Minnesota, which was approximately one-tenth of one per cent of its total mileage.

Appellant denies that the gross earnings tax should be applied to any of the freight car per diem credits

regardless of the formula used in computing the amount supposed to be taxable in Minnesota.

It is a usual and necessary incident of the railroad business that freight cars be interchanged freely between railroads in accordance with the requirements of freight traffic. Section 1 of the Interstate Commerce Act gives the Interstate Commerce Commission jurisdiction over car service, including the requirement that freight cars be interchanged. These requirements are such that a large proportion of each railroad's rolling stock is usually in the possession of other railroads. The lines of movement followed by its cars are not subject to its own control. Even in times of great car shortage no railroad has the right to haul a carload shipment to the end of its own line and there unload it and keep its cars. If such shipment is consigned to a point beyond its own lines the law requires the car to follow the shipment wherever it may go. The movements of traffic are such that there may habitually be large credits in favor of the Illinois Central Railroad from some one connecting carrier and there may be similarly large debits growing out of car interchanges with another carrier. These things are beyond the control of any carrier. The net result of all such interchanges is shown in the accounts as reported to the Interstate Commerce Commission under the heading "Hire of Equipment, Credit Balance" or "Hire of Equipment, Debit Balance".

It is obviously a burden on interstate commerce for a state to impose on a railroad company a tax of five per cent of the gross receipts from the interchange of freight cars in interstate commerce, unless such exaction can be justified in some reasonable and logical way as a part of the concept of the gross income tax as a tax on the property used to produce the income.

When a railroad company has leased its cars to another railroad company, the lessee enjoys all of the beneficial rights of ownership during the term of the lease and when the lessee has paid the tax on the gross receipts earned, the cars have been fully taxed and there is no logical basis for applying an additional tax.

Each state in which the Illinois Central operates has the same right to take its net railway operating income into consideration as a basis of determining the value of the entire railroad system, and then to allocate to itself such proportion as may be reasonable, taking into consideration miles of track and other recognized bases of allocation.

Therefore, it may not be improper for the state of Minnesota to apply its gross earnings tax to the hire of equipment credit balances, (where there are such balances) as determined under the rules of the Interstate Commerce Commission, which require that such balances shall be determined by taking all railroads into the balancing process; and then to allocate as the Minnesota proportion of such credit balances only a percentage *based on appellant's own mileage within the state.* While we do not believe that the gross earnings tax should be applied to rentals resulting from the interchange of freight cars, under any formula, we do not object to the payment of a tax based on hire of equipment credit balances, if such balances be computed by taking all railroads into the balancing process, as required under the rules of the Interstate Commerce Commission and if such balances are prorated on the basis of appellant's own line of railway or own revenue car miles since there is some basis for claiming that such a tax has some reasonable relationship to the value of appellant's business property used by it in the state.

But here the state of Minnesota attempts to apply its gross earnings tax to an amount produced by a formula which has the effect of creating a totally non-existent element of value by taking into consideration only credit balances between the Illinois Central and not all but certain other individual lines of railroad and allocating to Minnesota a proportion thereof *based on the operations of the using instead of the reporting railroad.*

Hire of equipment credit balances, are customarily a negligible part of the earnings of the Illinois Central System, as shown by its income account for each of the years in question (R. 76A) and therefore constitute a negligible element in determining the value of its property for purposes of taxation. Nevertheless the Burlington formula would produce an additional tax of over $3,000 per annum, although the five per cent tax when applied to all of the earnings of the Illinois Central's own business and operations in Minnesota produces a tax of but $4,000 per annum.

Treating, as might be done, hire of equipment credit balances as an element of value of the entire Illinois Central System distributable in proportion to the freight car mileage of the company in each state, is quite different from the treatment of such credit balances with each other railroad separately as income, taxable in the states in which such income is allegedly earned. This distinction is fundamental in the concept of the gross income tax using gross income as a method of valuing and taxing the property used to produce the income, in lieu of all other taxes, as compared with a true income tax. A true income tax may be applied to income no matter how many persons may receive the same income in succession. But when income is used as a basis of

valuing property the same income cannot be taxed again, nor can the property be again taxed, either through direct assessment as in the *Hopkins* v. *Southern California Telephone Company, supra,* nor by taxing rentals received by the owner, which would amount to a duplicate valuation of the same property, condemned in *State* v. *St. Paul M. & M. R. Co.*, 30 Minn. 311, 15 N. W. 307, and in *State* v. *St. Paul Union Depot Co.*, 42 Minn. 142, 43 N. W. 840. The Illinois Central movements are virtually all interstate as is shown by the maps and oral testimony. If it is income at all it is system income. If any portion of it be used as the measure of the railroad's value in a state, the amount allocated must bear a direct relationship to the proportion of its system property in the state, not the proportion of some other railroad in the state.

The use of the Burlington or any other formula cannot obscure the fundamental fact that this is an attempt to apply the gross earnings tax to rentals of property received by the owner after the gross earnings tax has been applied to the earnings produced by the use of the property. Take, for example, the detailed statement of the method of arriving at the amount of the judgment in this case by the application of the Burlington formula, as shown by Exhibit "A" to the Plaintiff's Motion for Amended Findings. (R. 86-94.) This statement (R. 87) shows that the Illinois Central interchanged freight cars with 21 other railroads in the State of Minnesota during the year 1922. Among others was the Duluth & North Eastern Railroad, as to which the column headed "Rentals from other lines for use of cars" shows a gross rental in favor of the Illinois Central of $109.00, without any offset. Similarly, the Minnesota, Dakota & Western Railway and

the Minnesota Western Railroad had per diem rentals in favor of the Illinois Central without any offsets. All three of these railroads are wholly in Minnesota, so the five per cent gross income tax was applied to the entire car rentals accruing to the Illinois Central from these roads. In other cases, there were rentals chargeable both for and against the Illinois Central as, for example, in the case of the Chicago, Milwaukee, St. Paul & Pacific, as to which the credits in favor of the Illinois Central were $605,814 and the charges by that railroad against the Illinois Central were $322,272, resulting in a credit balance from hire of freight cars in favor of the Illinois Central of $283,541.52. 11.82 per cent of the Milwaukee Road is in Minnesota, so it was assumed that 11.82 per cent of the above car rentals were earned in Minnesota, with the result that the five per cent tax was applied to the Minnesota proportion of said rentals amounting to $33,514. All of the other items are similar to these. Thus the gross earnings tax is applied to car rentals whether there is any offset or not, and where an offset is allowed it is but the negligible percentage of eleven hundredths of one per cent.

There has been no attempt to apply this gross earnings tax to cars used by railroads in Minnesota owned by other railroads which have no tracks in Minnesota such as, for example, the cars of the Pennsylvania Railroad Co., the New York Central Railroad Co., and the Atchison, Topeka & Santa Fe Railway Company, although such cars, in the course of the vast interchange of freight cars among railroads all over the United States, frequently move within the State of Minnesota. Such cars while in transit across the state are properly taxable as property used in the state under the gross earnings tax applied to the using companies, but they cannot legally again be taxed in Minnesota against their owners by the gross earnings tax method

any more than they could be taxed by the ordinary ad valorem tax method, since such cars constitute, with relation to their owners, personal property *in transitu* and as such are exempted from local taxation. (See *Commonwealth* v. *Union Pacific Railroad Company*, 214 Kentucky 339, 283 S. W. 119, and proceedings of 31st Conference of National Tax Association, 1938, pages 166 to 173.)

There is no legal difference between the taxable situation of the cars of the Illinois Central Railroad Company operated on the lines of other railroads in Minnesota and the situation of cars of other railroad companies similarly interchanged and used in Minnesota when such other railroad companies have no tracks in the state. In other words, the mere fact that the Illinois Central operates about thirty miles of tracks in the State of Minnesota cannot logically change the taxable position of Illinois Central cars interchanged with, and used by, other railroads which have tracks in that state. Such a tax on car rentals cannot justly be used as an additional tax on the cars themselves which have already been taxed as part of the property which is the basis of the gross earnings tax applied to the using railroads, nor can it justly or logically be used as a basis for increasing the tax on the thirty miles of rail operated by the Illinois Central in that state. It is just as illegal to use these rentals as a basis for increasing the tax on property which is otherwise taxable as it is to use the tax as a means of double taxation on the cars themselves. A legal tax cannot be increased by an illegal measure based on something not taxable. *McCallen* v. *Massachusetts*, 279 U. S. 670; *Hopkins* v. *Southern Cal. Telephone Co.*, 275 U. S. 393.

Subterfuges which have the effect of taxing interstate commerce are illegal, however devious or complicated the

evasive process may be. *Cooney* v. *Mountain States T. & T. Co.*, 294 U. S. 384.

To use the small mileage of the Illinois Central System in Minnesota as an excuse for taxing freight car per diem rentals which do not accrue on the thirty miles of its road in the state would be, in the language of the U. S. Supreme Court, *Wallace* v. *Hines*, 253 U. S. 66 "to expose the heel of the system to a mortal dart."

Burlington Formula Conflicts with Statute.

Another reason why freight car per diem credits are not taxable in any amount is that under the specific provisions of the statute itself they are not "*gross earnings derived from the operation of such line of railway within this state.*" The words of the statute "line of railway within this state" are not ambiguous and can have but one meaning. They cannot be distorted to mean that a tax against the reporting road can be based upon the operation, not on the reporting line but on other lines. It is obvious that the extent of the operation of the other lines is used, rather than the operation on appellant's line, for the reason that the other lines have a much larger percentage of their revenue freight car mileage in the state, thus producing a larger tax. But the very words of the statute limit the tax to earnings or transactions arising on the line of railway of the reporting company. If it did not, the state could tax freight car per diem rentals accruing to roads having no tracks in Minnesota, condemned in *State* v. *Great Northern Railway Company,* 163 Minn. 82-92. The Supreme Court of Minnesota there held that credit balances with railroads having no railroad in the state could not be taxed, although the cars were used and the rentals accrued in Minnesota. It follows, for the same reason, that credit balances, real or imaginary, accruing on some line other than that of the reporting road cannot be taxed where, as here, there is no appropriate or rational relationship be-between them and the value of the taxable property in the state.

II.

The Construction of the Statute so as to Permit the Application of the So-called Burlington Formula Is so Discriminatory, Capricious and Unreasonable as to Violate the Equal Protection, Due Process and Commerce Clauses of the Federal Constitution.

If it be decided that freight car per diem credits may be taxed notwithstanding (a) the income from the same cars is already taxed against the using line, thus resulting in unequal and double taxation, (b) the income is not derived from the operation of the reporting line as required by the specific provision of the statute itself, then it is necessary to determine whether the application of the Burlington formula, as applied to this particular railroad company, can be justified.

This court said in *Norfolk & Western Ry. Co.* v. *State of North Carolina*, 297 U. S. 682-685:

> "A formula not arbitrary on its face or in its general operation may be unworkable or unfair when applied to a particular railway in particular conditions."

In *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123, the State of North Carolina imposed a tax on the income of a New York Corporation. Under the North Carolina statute there was allocated for taxation that part of the net income which bore the same ratio to the entire net income as the value of the tangible property within the state bore to the value of all of the company's tangible property. This court held that such an application of the statute produced an unconstitutional result since the part of the income thus attributed to the state was out of all appropriate proportion to the business transacted by the corporation in the state.

The court said, page 134:

"When, as in this case, there are different taxing jurisdictions, each competent to lay a tax with respect to what lies within, and is done within, its own borders, and the question is necessarily one of apportionment, evidence may always be received which tends to show that a State has applied a method, which, albeit fair on its face, operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction."

And page 135:

"For the present purpose, in determining the validity of the statutory method as applied to the appellant, it is not necessary to review the evidence in detail, or to determine as a matter of fact the precise part of the income which should be regarded as attributable to the business conducted in North Carolina. It is sufficient to say that, in any aspect of the evidence, and upon the assumption made by the state court with respect to the facts shown, the statutory method, as applied to the appellant's business for the years in question operated unreasonably and arbitrarily, in attributing to North Carolina a percentage of income out of all appropriate proportion to the business transacted by the appellant in that State. In this view the taxes as laid were beyond the State's authority. *Shaffer* v. *Carter*, 252 U. S. 37, 52, 53, 57."

The Supreme Court of Minnesota, as has been pointed out, has repeatedly held that the gross earnings tax is a property tax in lieu of all other taxes. The statute specifically so provides. Any formula used as the basis for allocating a portion of interstate earnings must, therefore, bear a reasonable and direct relationship to the amount of the taxpayer's property in the state of Minnesota.

What are the facts? Passing for later discussion, the admitted fact that appellant paid the amount of this tax for the years in question in accordance with the formula prescribed by the state agency authorized by the legislature to act (Rec. 27 and 61; Ex. 2, Rec. 76a), and passing

for the present the admitted fact that the Burlington formula, which the state now attempts to use, has never been adopted nor prescribed by a public examiner, a comptroller or a tax commission of the state of Minnesota or any other agency of the state having authority to act (Rec. 126, 132), and passing by the admitted fact that the formula was not pleaded, but was first suggested to the court as the result of the compromise of another lawsuit in a motion for a new trial (Rec. 97, 105), let us consider what the record shows concerning the application of the Burlington formula.

The amount of tax produced by the Burlington formula for the years 1922-29, inclusive, is shown by the following table (Sup. Rec):

Name of Road	Total Mileage	Miles in Minnesota	Claimed Under Burlington Formula
Big Fork & International Falls Railway Co...	33.67	33.67	None
Big Fork & Northern Ry. Co...........	31.60	31.60	None
Canadian Northern Railway Co............	No report		$ 7,722.78
Chicago & Northwestern Railway Co.......	8,328.86	650.30	17,744.41
Chicago, Burlington & Quincy Railroad Co..	9,070.14	23.61	18,796.94
Chicago Great Western Railroad Co.........	1,410.13	400.74	None
Chicago, Milwaukee & St. Paul Railway Co..	10,566.32	1,220.37	None
Chicago, Rock Island & Pacific Railway Co..	7,201.80	234.24	35.83
Chicago, St. Paul, Minneapolis & Omaha Ry. Co....................	1,676.81	431.69	None
Dubuque & Sioux City Railway Co.........	(Operated by Ill. Cent.)		
Duluth & Iron Range Railroad Co...........	277.15	277.15	None
Duluth & Northeastern Railroad Co.........	61.75	61.75	None
Duluth & Northern Minnesota Railway Co...	100.80	100.80	None
Duluth, Missabe & Northern Railway Co....	395.90	385.41	None
Duluth, Rainy Lake & Winnipeg Ry. Co......	(Operated by D. W. & P.)		
Duluth, South Shore & Atlantic Ry. Co......	562.10	—	108.96
Duluth Terminal Railway Co..............	—	—	None
Duluth Union Depot & Transfer Co.........	—	—	None
Duluth, Winipeg & Pacific Railway Co......	169.00	169.00	None
Electric Short Line Railway Co............	54.40	54.40	None
Electric Short Line Terminal Co...........	—	—	(?)
Great Northern Railway Co.............	7,779.94	2,103.40	
Green Bay & Western Railway Co..........	228.57	—	$ 294.44
Hill City Railway Co.....................	20.09	20.09	None
Illinois Central Railroad Co..............	4,573.78	30.15	26,414.59
Mason City & Fort Dodge Railway Co.......	(Included in C. G. W.)		None
Minneapolis & Rainy River Railway Co......	62.67	62.67	None
Minneapolis & St. Louis Railroad Co........	1,537.68	376.99	None
Minneapolis Eastern Railway Co...........	—	—	None
Minneapolis, Northfield & Southern Ry. Co..	68.64	68.64	None
Minneapolis, Red Lake & Manitoba Ry. Co..	33.50	33.50	None
Minneapolis, St. Paul & Sault Ste. Marie Ry. Co..........................	4,307.04	1,037.78	None
Minneapolis Western Railway Co...........	—	—	None
Minnesota & International Railway Co.......	178.66	178.66	None
Minnesota & Manitoba Railway Co..........	43.70	43.70	None
Minnesota, Dakota & Western Railway Co...	17.87	17.87	None
Minnesota Transfer Railway Co............	—	—	None
Northern Pacific Railway Co...............	6,399.33	973.07	(?)
Railway Transfer Company of Minneapolis...	—	—	None
St. Paul Bridge & Terminal Railway Co......	—	—	None
St. Paul Union Depot Co..................	—	—	None
Spirit Lake Transfer Co..................	—	—	None
Winona Bridge Railway Co.................	—	—	None
Wisconsin Central Railway Co.............	(Operated by Soo Line)		None

These same facts are shown by the testimony of the state employees, corporate examiner Bergstrom and secretary of the tax commission Nelson (Rec. 144, 152, 154, 165, 170). Although the witnesses were so evasive the court had to admonish them (Rec. 132, 154, 156, 158, 159).

The foregoing table discloses that if the Burlington formula had been prescribed as required by statute by the public examiner with the approval of the state tax commission for the years 1922 to 1929 inclusive, of the forty-four railroads shown in the state, the formula would have produced a tax against but seven other lines. The Chicago, Great Western with 400 miles of road in the state would have paid no tax during these eight years. The Milwaukee with 1,220 miles would have paid no tax. The Omaha with 431 miles would have paid no tax. The Duluth & Iron Range with 277 miles, none. The Duluth, Missabe & Northern, 385 miles, none. The Minneapolis, St. Paul & Sault Ste. Marie 1,037 miles, none, to mention only some of the more important roads which had several times as much mileage in the state as the thirty miles owned by the Dubuque & Sioux City Railway Company which is operated by the Illinois Central.

Not only, as shown by the foregoing table, does the Burlington formula produce no tax against most of the railroads in the State of Minnesota for the years 1922 to 1929 inclusive, but as is shown by the following table but seven other roads made any return of such income for the years 1935 and 1936, the only years for which returns were available at the time of trial:

Per Diem Returns 1935-6

	1935	1936
Canadian Northern	$ 9,246.26	$ 22,585.03
Chicago Great Western	None	None
Chicago, Burlington & Quincy	14,676.40	29,254.59
Chicago, Milwaukee, St. Paul & Pac	None	None
Chicago & Northwestern	14,678.43	43,772.21
Chicago, Rock Island & Pacific	4,505.05	10,982.74
Chicago, St. Paul, Minneapolis & Omaha	None	None
Duluth, Missabe & Northern	32,183.66	None
Duluth & Northeastern	None	None
Duluth, South Shore & Atlantic	None	None
Duluth, Winnipeg & Pacific	None	None
Great Northern	None	48,581.51
Green Bay & Western	1,169.60	48.89
Minneapolis, Anoka & Cuy. Range	None	None
Minneapolis & St. Louis	None	None
Minneapolis, St. Paul & Sault Ste. Marie	None	None
Minneapolis, Northfield & Southern	None	None
Minnesota, Dakota & Western	None	None
Minnesota Western	None	None
Minnesota, Red Lake & Manitoba	None	None
Minnesota Transfer	None	None
Minnesota & International	None	None
Northern Pacific	111,323.26	13,415.87—1st 6 mos. 161,085.96—2nd 6 mos.
Illinois Central (in litigation)	—	—
Railway Transfer Co	None	None
Minnesota Northern Elec	None	None
Wisconsin Central (M. St. P. & S. S. M.)	None	None

That there actually is no relationship between the amount of railroad property of any company in the State of Minnesota and the amount of the tax produced by the Burlington formula is conclusively shown by the testimony of Mr. Bergstrom (Rec. 151), Corporate Examiner of the State of Minnesota in the Comptroller's office (Rec. 139.) The record discloses that Mr. Bergstrom not only was an official corporate examiner of the state, being one of those who audited the accounts of the Illinois Central Railroad Company for the years in question who certified to the State Auditor the amount of a small balance which was paid (Rec. 60), but that he was also the tax expert for the state who had charge of this litigation (Rec. 20-21). He testified in response to the question:

"Q. Disregarding for the purpose of this question the rolling stock, it is true, is it not, Mr. Bergstrom,

that there is no relation between the amount of the tax produced by the 'Burlington' formula and the amount of other railroad property any company may have in the State?

A. That is true." (Rec. 151.)

In response to the question:

"Q. Are you the Bergstrom who was referred to by Mr. Boyle, Chairman of the Tax Commission, as the man who handles these railroad tax matters?

A. Yes, sir."

This testimony of itself condemns the formula. The statute provides, and the Supreme Court of Minnesota has construed it to mean, that the tax is a property tax "in lieu of all of the taxes upon all property in this state" (Sec. 2246, Appendix A). That it is a property tax is held in *United States Express Company* v. *Minnesota,* 223 U. S. 335; *Cudahy Packing Company* v. *Minnesota,* 246 U. S. 450; *Railway Express Agency* v. *Holm,* 180 Minn. 268, 239 N. W. 815. If, as must be conceded, it is a property tax and if the state admits, as it unqualifiedly does, by this testimony, that there is no relation between the amount of the tax produced by the formula and the amount of the taxable property in the state, there can be no conceivable defense to its application.

The lack of relationship between the amount of business done by a railroad and the amount of the tax computed under the Burlington formula is again definitely shown by the testimony of Corporate Examiner Bergstrom. (R. 149):

"Q. Might it not be true under the 'Burlington' formula two roads with exactly the same number of debits and credits for the particular reporting period under their freight car per diem accounting would, because of the respective mileage of the two roads, produce a result where one would have a tax to pay and the other would not?

A. That is true."

And again the witness testified (R. 150): It is a fact that the Milwaukee Railroad with its thirteen hundred miles of road does a great deal more business in the state than the Illinois Central Railroad with its thirty miles of track. The Burlington formula produces no tax against the Milwaukee for the years 1922 to 1929. (This last testimony is summarized, not quoted literally.)

We submit that, under the repeated decisions of this court, a property tax which bears no relationship to the amount of the taxable property in the state, is unequal taxation, discriminatory, denies the taxpayer the equal protection of the law and takes his property without due process of law in violation of the Fourteenth Amendment.

> *Hans Rees' Sons* v. *North Carolina,* 283 U. S. 123, 134, 135.
>
> *Southern Ry. Co.* v. *Kentucky,* 274 U. S. 76, 80.
>
> *Shaffer* v. *Carter,* 252 U. S. 37, 52, 53, 57.
>
> *Oklahoma* v. *Wells Fargo & Co.,* 223 U. S. 298.
>
> *Hopkins* v. *Southern California Telephone Co.,* 275 U. S. 393, ...
>
> *Wallace* v. *Hines,* 253 U. S. 66.
>
> *Union Tank Line Co.* v. *Wright,* 249 U. S. 275, ...

The gross income on which the Minnesota tax is imposed is the method used by the State of Minnesota in determining the value of appellant's property in the state and in measuring its share of the tax burden. Where interstate gross earnings are taxed, the proportion of such interstate system gross earnings allocated to a state for taxation purposes must be in an appropriate proportion,—it must have a fair, rational and non-discriminatory relationship to the amount of taxable property in the state.

In *Southern Railway Company* v. *Kentucky,* 274 U. S. 76, the Kentucky statutes provided for the capitalization

of the net railway operating income of the entire system and allocated to Kentucky its mileage proportion of that amount. The evidence disclosed that the mileage basis of apportionment was arbitrary and unjust. And, as in the present instance, the operation of the road in the state was a losing venture. The basis for apportionment was held to violate the due process clause of the Fourteenth Amendment, not of course because the business was a losing venture, but because it allocated to Kentucky values which did not there exist.

In *Oklahoma* v. *Wells Fargo & Company*, 223 U. S. 298, the Oklahoma tax on gross revenue of corporations was condemned as an unconstitutional burden on interstate commerce. In the present instance the Minnesota tax is attacked, not only as an unconstitutional burden on interstate commerce, but also upon the grounds that it is so arbitrary, unequal and discriminatory as to deny the equal protection of the law and take property without due process. Regardless of the ground on which the attack is sustained the basis of allocation is unsound and the tax must be condemned. It is true that in this Oklahoma case the tax was not a property tax, but was a tax on revenue. But it was condemned because the tax was on gross receipts not properly attributable to the state.

In *Wallace* v. *Hines*, 253 U. S. 66, the North Dakota statute was condemned because of the method used in allocating values to the state. The evidence disclosed that the basis used was indefensible.

In *Great Northern Ry. Co.* v. *Weeks*, 297 U. S. 135, the basis of apportioning value of the railway to the State of North Dakota for taxation purposes was condemned under the due process clause, and also attacked under the equal protection and commerce clauses, for the reason that

it was shown to have been arbitrarily made and grossly excessive.

It has long been recognized that discrimination between taxpayers, if intentional or so persistent as to be systematic, is a denial of equal protection, whether the discrimination is in the application of different rates to property in the same class or inequality in its valuation.

> *Iowa Des Moines Bank* v. *Bennett*, 284 U. S. 239, 245;
>
> *Cumberland Coal Company* v. *Board of Review*, 284 U. S. 83;
>
> *Chicago G. W. Ry. Co. v. Kendall*, 266 U. S. 94, 98, 99;
>
> *Sioux City Bridge Company* v. *Dakota County*, 260 U. S. 441, 445.
>
> *Raymond* v. *Chicago Traction Company*, 207 U. S. 20, 37.

We make no pretense of citing all of the cases in point. Each case of this character must of necessity be decided upon the record in that particular case. Where, as in the present instance, the tax officials of the state finally admit that there is no relationship whatever between the amount of the tax produced by the application of a particular formula, which the state attempts to use, and the amount of the property which the state seeks to tax; where, during the years in question, but six or seven other railroads out of forty-nine in the state, would be taxed in any amount whatever under this formula; where the tax is based on the amount of operations, not of the taxed railroad but of other roads in the state; and finally where as a result of the use of the formula the amount of the tax increases as the relative amount of the reporting railroad's business decreases,—it is clear the tax cannot be justified.

If these per diem credits are taxable in any amount, and we contend they are not, the amount of the tax must be appropriately proportionate to the amount of the taxpayers property in the state. Since it is not, it is unequal, discriminatory, is therefore lacking in due process, and is an unreasonable burden on interstate commerce.

A copy of appellant's income account filed with the Interstate Commerce Commission for each of the years 1922-1929 was introduced in evidence as defendant's Exhibit 13 (R. 55, 56) and the witness who identified this exhibit testified therefrom (R. 56) *that for each of the years* 1922 *through* 1929, *excepting only the year* 1924, *the Illinois Central actually had a debit balance for the hire of freight cars.* There was no credit balance in favor of the Illinois Central System for hire of equipment for any year except 1924. In 1924 the credits exceeded the debits by $795,360. In the other seven years the debits exceeded the credits as follows: for 1922 the net debit was $95,674; in 1923 the net debit was $1,327,898; in 1925 the net debit was $340,722; in 1926 the net debit was $1,306,986; in 1927 the net debit was $2,275,061; in 1928 the net debit was $1,183,686; in 1929 the net debit was $1,278,976.

Yet, in every one of these years the Burlington formula produces a result which indicates that the Illinois Central had net credits attributable to the state of Minnesota in the following amounts (final judgment, R. 86).

	Minnesota Proportion of Credit Balances	Minnesota Proportion of Debits Balances	Net Credit Balance	Tax @ 5%
1922	$ 95,359.49	$ 237.43	$ 95,122.06	$ 4,756.10
1923	91,413.54	197.55	91,215.99	4,560.80
1924	89,432.09	350.27	89,081.82	4,454.09
1925	56,146.19	158.21	55,987.98	2,799.40
1926	30,544.42	197.18	30,347.24	1,517.36
1927	60,132.80	83.89	60,048.91	3,002.45
1928	57,495.76	100.97	57,394.79	2,869.74
1929	49,184.12	91.18	49,092.94	2,454.65
	$ 529,708.41	$ 1,416.68	$ 528,291.73	$ 26,414.59

These nonexistent or fictitious net credit balances are used by the state of Minnesota to add an element of taxable value to the cars or other property; whereas the evidence is uncontradicted that in seven of the eight years in question the appellant received no net rentals for hire of equipment at all but, on the contrary, paid out substantially more than it received as a result of the enforced interchange of freight cars. Bearing in mind that the Minnesota gross earnings tax is a property tax, the conclusion is obvious that the state is using a fictitious factor in determining the value of appellant's property in the state.

As stated earlier in our brief, credit balances for hire of equipment can only be considered an element of value of railroad freight cars when the entire result of the interchange of cars between appellant and all other railroads is taken into consideration. There is no credit balance and there are no earnings until a balance is struck for the system as a whole.

The interchange of freight cars between railroads is such that Illinois Central cars sometimes go into states such as Florida or California, where the Illinois Central has no tracks. If the Burlington formula should be sustained, fictitious credit balances could be assumed to exist in those states, since there would be no allowable offsets, due to the absence of tracks. Every state in the Union in which the Illinois Central has no tracks would have a credit balance to tax. This would be true even though the net system balance was against the company, as it was for seven of the eight years in controversy.

Mr. G. J. Bunting, vice-president of the Illinois Central, testified (R. 57-79) that the amount of interchanging the Illinois Central does at points in Minnesota (except the interchange with the M. & St. L. at Albert Lea) is ex-

tremely small, and that there is no probability that the same percentage of car days accrued in Minnesota is indicated by the freight car mileage of the using railroad. The state offered no evidence whatever to meet this nor to disprove the other statements which show how completely unfair and unworkable the formula is.

If freight cars per diem credits are to be used as the measure or partial measure of the value of the property of a railroad for tax purposes in the state of Minnesota, then they must be used to measure the value of the property of *all* the railroads in the state. Otherwise there is obvious discrimination. It cannot legally be used to measure the value of but six or seven and not of the other thirty or more. As appears from the returns of the railroads for 1935 and 1936, (Exhibit 21) the use of the Burlington formula produces a tax on freight car per diem credits of but seven other roads; six others if applied to the figures in 1922-1929.

It is a matter of common knowledge, is shown by the record, and will be admitted by the state, that on every road in the state there are, during every six months period, thousands of cars owned by other companies. This is necessarily and inevitably true because of the provisions of the Interstate Commerce Act which require the carriers to take all shipments through to destination in the same car.

There can be no justification for increasing the taxable value of roads like the Illinois Central with but eleven one hundredths of one per cent of its mileage in the state and failing to use the same yardstick for thirty-two other roads in the state with fifty or a hundred times more mileage and property subject to taxation. (See table heretofore shown.)

The vice of the Burlington formula is that it produces a tax (or attempts to create a property value) increasingly large as the relative proportion of the taxpayers property in the state decreases.

Or expressing it another way, the smaller the percentage of the road in Minnesota the greater is the proportion of its freight car per diem credits taxed. If the taxable value is to be measured by the amount of business done, *i. e.*, by the amount of gross earnings, the exact contrary should be true.

Upon hasty consideration there is a certain degree of plausibility about the Burlington formula, but it will not stand careful analysis. It may well have been available for the settlement of a lawsuit, but it is clearly unworkable and incapable of general application. Assessing the value of railroad property according to the amount of business done by some other company on the line of such other company is contrary to the fundamental conception of a gross earnings tax, used as here, in lieu of a property tax.

If freight car per diem credits are to be taxed, the proportion allocated to Minnesota must be under some such formula as that promulgated and used by the state during all these years (Ex. 2, R. 76A), namely: a percentage fairly comparable to the proportion of the *reporting* roads property in the state. This was fairly measured by the Minnesota proportion of system revenue freight car miles. It can not, within constitutional limits, be measured by the amount of business done on some other road.

III and IV.

The Application in 1935 of a Then Invented Formula for the Allocation of Interstate Gross Earnings in 1922-29 Is Beyond the Limit of Permissible Retroactivity. This Is Particularly True Where the Full Amount of the Tax Demanded by the State Has Been Paid and Where the Accounts for the Years in Question Have Been Audited and the Balance Found Due Paid.

The Record shows:

1. The Minnesota legislature authorized the public examiner with the approval of the tax commission to prescribe the uniform system of accounts or formula (Sec. 2239, Appendix B). 2. The public examiner with the approval of the tax commission did prescribe the system to be followed (Ex. 2, R. 76A). 3. The Illinois Central paid the full amount of the tax computed under the system prescribed by the state (R. 27, 61). 4. The Minnesota statute provides for the auditing of the accounts by the corporate examiner and the certification of any unpaid balance (Sec. 3282, Appendix C). 5. Such an audit was made (R. 20, 21). 6. The balance found due as the result of the audit was paid (R. 21). 7. The Burlington formula first came into the case in a motion of the state for amended findings or a new trial November 21, 1935 (R. 84, 97).

The foregoing statements, numbered only to separate and emphasize them, clearly disclose how arbitrary and unreasonable the action of the state in seeking to impose this additional tax has been. If in 1935 the state could legally impose an additional tax on alleged gross earnings in 1922-29 after the tax had been paid in the full amount, computed according to the formula prescribed by an agency of the state acting with legislative authority, then there is

nothing to prevent the state from discarding the formula judicially adopted in 1935 and imposing an additional tax in 1948 and again in 1961 and again every thirteen years thereafter, *ad infinitum.*

Although the right of a state to determine for itself the form in which the tax burden shall be shared is unquestioned, and a wide discretion is allowed in prescribing the kind of taxation, yet there are, and necessarily must be, constitutional limitations on the power. The tax may not be capricious, arbitrary, discriminatory, nor unequal when applied to taxpayers in the same class.

Likewise there must of necessity be a limitation upon permissible retroactivity. While no attempt has ever been made by this court to precisely define or prescribe the limit to which a statute, or a formula used in the application of the statute, may be retroactively applied, the court has definitely recognized that there is a limit.

The question was considered in *Welch* v. *Henry,* 305 U. S. 134. There the Wisconsin statute, enacted in March 1935, imposed a tax on corporate dividends received in 1933. Claim was made that it contravened the equal protection and due process clauses of the Fourteenth Amendment. The court said, page 148:

> "Assuming that a tax may attempt to reach events so far in the past as to render the objection valid, we think that no such case is presented here".

And further, page 150-1:

> "In the present case the returns of income received in 1933 were filed and became available in March, 1934. Wisconsin Stat. 1933, Sec. 71.09 (4). The next succeeding session of the legislature at which tax legislation could be considered was in 1935, when the challenged statute was passed. By Sec. 11, Art. IV; Sec. 4, Art. V, of the Wisconsin constitution, and Sec. 12.02 Wisconsin Statutes, 1935, regular sessions of the legislature are held in each odd-numbered year. Special ses-

sions of the legislature may be held on call of the governor, at which no business can be transacted 'except as shall be necessary to accomplish the special purposes for which it was convened.' A special session was called by the governor in 1934, but for purposes unrelated to taxation. Proclamations of the Governor of Wisconsin December 2, 28, 1933, January 18, 22, 30, 1934. Thus the legislature in 1935, *at the first opportunity after the tax year in which the income was received*, made its revision of the tax laws applicable to 1933 income, as did Congress in the Joint Resolution of July 4, 1864, commented on in *Stockdale* v. *Insurance Companies, supra.*

"While the Supreme Court of Wisconsin thought that the present tax might 'approach or reach the limit of permissible retroactivity,' we cannot say that it exceeds it."

The court further said the taxpayer can not:

"* * * justly assert surprise or complain of arbitrary action in the retroactive apportionment of tax burdens to income at the first opportunity after knowledge of the nature and amount of the income is available. And we think that the 'recent transactions' to which this Court has declared a tax law may be retroactively applied, *Cooper* v. *United States*, 280 U. S. 409, 411, must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment."

If recent transactions to which the statute may be retroactively applied must be those arising during the preceding calendar and legislative year, or some period not greatly in excess of such limitation, it follows that the retroactive application of a taxing statute in 1935 to gross earnings in 1922-3-4-5-6-7-8 and 9 cannot be justified.

Retroactive taxes on gifts have been condemned because the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. The facts in the present instance meet this test,

although this court has never held that the constitutionality of a retroactive statute should stand or fall on that ground alone. The record discloses that appellant operates but thirty miles of railroad in Minnesota. This has been operated at a loss. Whether the operation producing gross earnings which is the basis of the tax would have been continued all these years had it been known the amount of *past* tax liability would be subject to capricious change and recurring additions, was a question which might well have been answered by withdrawal from the state. Certainly the taxpayer could not reasonably have anticipated that any such action as was taken would be taken by the state.

Retroactive application of a taxing statute has been sustained to include transactions consummated while the statute was in the course of enactment, *United States* v. *Hudson*, 299 U. S. 498, 500; where made applicable during that part of the same year preceding its enactment, *Stockdale* v. *Insurance Companies*, 87 U. S. 323, 331; where applicable to the preceding part of same year during which Sixteenth Amendment was operative, *Brushaser* v. *Union Pacific R. R.*, 240 U. S. 1-20; to transactions consummated during the same calendar year, *Cooper* v. *United States*, 280 U. S. 409, 411; and where it is the continuance of a similar provision in a prior statute, *Milliken* v. *U. S.*, 283 U. S. 15, 13.

But the books will be searched in vain for any decision upholding the retroactive application of a tax to a period antedating its application by thirteen years, where too the tax demanded by the state at the time had been paid.

Every reason for condemning the retroactive application of the tax law in *Nichols* v. *Coolidge*, 274 U. S. 531; *Blodgett* v. *Holden*, 275 U. S. 142; *Untermyer* v. *Anderson*, 276 U. S. 440, exists in the present instance. It must be admitted that a tax on gross earnings retroactively applied

to transactions which occurred thirteen years prior to the exaction may in certain circumstances become as arbitrary and unreasonable as though the tax were on a gift. However disposed the court may be to sustain the taxing power of the state, the circumstances of the present case and the attempted exaction is so palpably unfair and unreasonable as to be wholly indefensible.

The court of appeals of New York in *People* v. *Graves,* 21 N. E. (2d) 371 condemned as unconstitutional the retroactive application of an income tax statute effective in 1935 which by its terms was made retroactive to January 1, 1919. The court said, page 372:

> "While it is true that not all retroactive statutes are void, nevertheless, it is a fundamental rule of construction that retroactive operation of statutes is not favored by courts and will not be given such construction unless the language expressly or by necessary implication requires it. Whether a statute which by its express terms is retroactive will be sustained is usually a question of degree.
>
> "Taxing statutes which by their terms were retroactive for short periods have been held to be valid. No case has ever held such a statute to be valid which attempted to permit a retroactive assessment of a tax for as long a period as sixteen years." * * *
>
> "We believe the amendment is unreasonable, arbitrary, capricious and palpably unjust."

The Supreme Court of Minnesota has also condemned statutes because retroactive.

State v. *Western Union Telephone Company,* 111 Minn. 21.

Gray v. *City of St. Paul,* 105 Minn. 19.

Although the objections were repeatedly raised and emphatically called to the attention of the State Supreme Court as clearly appears from the averments of the

answer, the briefs filed in the Supreme Court and the decisions of the court itself, yet the court chose to summarily dispose of all constitutional objections by the *ipse dixit:*

> "If computation of defendant's credit balances from the interchange of freight cars with railroads operating in this state according to the said formula or method reaches accuracy more nearly than any other, all constitutional objections to its use vanish."

In the light of the facts disclosed by the record in this case perhaps this summary disposition of constitutional objections was the best available. Furthermore the record discloses that the formula legally adopted by the taxing authorities (Rec. 76A) and judicially discarded, was far more accurate.

V.

A "Statute of Any State", Decision Concerning the Constitutionality of Which May Be Reviewed on Appeal, Is Not Limited to Enactments of the State Legislature, But Includes Every Act, Legislative in Character, to Which the State Gives the Force of Law, Such as an Order of a State Tax Commission, or the Decision of a Court Substituting Its Choice of a Formula for That Prescribed by the Commission.

King Mfg. Co. v. *City Council of Augusta* (1929), 277 U. S. 100, 48 S. Ct. 489, 72 L. Ed. 801.

Live Oak Water Users' Ass'n v. *Railroad Commission of State of California* (1926), 269 U. S. 354, 46 S. Ct. 149, 70 L. Ed. 305.

Hamilton v. *Regents of University of California* (1934), 293 U. S. 245, 55 S. Ct. 197, 79 L. Ed. 343.

Lake Erie & Western R. R. Co. v. *State Public Commission ex rel. Cameron*, 249 U. S. 422-4.

Sultan Ry. Co. v. *Dept. of Labor*, 277 U. S. 135.

The merits of the case are not involved under this point. It is argued by the state in objections to the jurisdiction of this court that:

> "The statute itself was not subject to attack, but the computation of a tax under the statute."

This is not an exact statement of appellant's position. The attack is not on the computation, but is on the application of a formula. The State of Minnesota attempts to make the formula a part of the statute itself, although it can not be found in the statute. Appellant contends that if the statute be construed so as to permit the application of this formula, it is unconstitutional.

While the exaction is not legislative, it is attempted nevertheless under a state statute and is subject to constitutional limitations. As this court said in *King Mfg. Co.* v. *Augusta*, 277 U. S. 100-103:

> "'It of course rests with each State to determine in what form and by what agencies its legislative power may be exerted. It may legislate little or much in its constitution, may permit the electorate to make laws by direct vote, may entrust its legislature with wide lawmaking functions and may delegate legislative authority to subordinate agencies, such as municipal councils and state commissions. But whether this power be exerted in one form or another, or by one agency or another, the enactments put forth, whether called constitutional provisions, laws, ordinances or orders, are in essence legislative acts of the State; they express its will and have no force otherwise. As respects their validity under the Constitution of the United States all are on the same plane. If they contravene the restraints which that instrument places on the legislative power of a State they are invalid, no matter what their form or by what agency put forth; for, as this Court has said, the protection which these restraints afford applies, "whatever the form in which the legislative power is exerted; that is, whether it be by a constitution, an act of the legislature, or an act of any subordinate instrumentality of the State exercising delegated leg-

islative authority, like an ordinance of a municipality or an order of a commission." *Standard Scale Company* v. *Farrell*, 249 U. S. 571, 577.'"

Conclusion.

We contend:

First. The Minnesota gross earnings tax cannot be applied to freight car *per diem* rentals in any amount.

Second. The attempted application of the Burlington formula is so discriminatory, capricious and unreasonable as to violate the equal protection, due process and commerce clauses.

Third. If any amount was due under the statute, it was paid in full, computed under a formula prescribed by the agency of the state authorized by the legislature to act.

Fourth. The retroactive application of the formula exceeds the permissible limit.

Respectfully submitted,

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APPENDIX A.

(Secs. 2246-9 Mason's Minnesota Statutes 1927.)

Railroad Companies.

2246. *Gross earnings.*—Every railroad company owning or operating any line of railroad situated within or partly within this state, shall, during the year 1913 and annually thereafter, pay into the treasury of the state, in lieu of all taxes, upon all property within this state owned or operated for railway purposes, by such company, including equipment, appurtenances, appendages and franchises thereof, a sum of money equal to five per cent of the gross earnings derived from the operation of such line of railway within this state.

On or before August 15, 1913, and annually thereafter, each such railroad company shall make, according to law. a true and just return of all such gross earnings for the six months ending June 30th next preceding, and the said tax of five per centum thereon shall become due and payable to the state of Minnesota in manner provided by law, on September 1st next thereafter.

On or before February 15, 1914, and annually thereafter, each such railroad company shall make, according to law, a true and just return of all such gross earnings for the six months ending December 31st next preceding, and said tax of five per centum thereon shall become due and payable to the state of Minnesota in manner provided by law, on March 1st next thereafter; and the payments of such sums at the times hereinbefore set forth shall be in full and in lieu of all other taxes upon the property and franchises so taxed.

The lands acquired by public grant shall be and remain

exempt from taxation until sold or contracted to be sold or conveyed as provided in the respective acts whereby such grants were made or recognized ('12 c. 9 S. 1; amended '19 c. 533) (2226).

2247. *"Gross earnings" defined.*—The term "the gross earnings derived from the operation of such line of railway within this state," as used in section 1 of this act is hereby declared and shall be construed to mean, all earnings on business beginning and ending within the state, and a proportion, based upon the proportion of the mileage within the state to the entire mileage over which such business is done, of earnings on all interstate business passing through, into or out of the state ('12 c. 9 S. 2) (2227).

2248. *Repeal.*—All acts and parts of acts not inconsistent herewith, regulating the payment, collection, time of payment, enforcement or reports involving the amount of taxes upon the gross earnings of railroad companies within this state or providing penalties for the nonpayment of such taxes, are hereby made applicable to this act so far as may be, and all acts and parts of acts inconsistent with the provisions of this act are hereby repealed ('12 c. 9 S. 3) (2228).

2249. *Collection by civil action.*—Upon failure to pay the amount of such taxes legally due, upon the respective dates hereinbefore set forth, collection thereof may be enforced in addition to existing remedies in a civil action brought in the name of the state of Minnesota in the district court of any county ('12 c. 9 S. 4) (2229).

APPENDIX B.

(Sec. 2239 Mason's Minnesota Statutes 1927.)

2239. *Uniform system of accounting.*—The public examiner, with the approval of the tax commission, shall have authority and power to prescribe for such companies, joint stock associations, co-partnerships, corporations, or individuals a system of gross earnings accounts, that shall be uniform for each class of companies, and he shall supervise the method of keeping such accounts; provided, that such system shall conform as nearly as practicable with that prescribed for such companies by the United States government ('13 c. 487 S. 6) (2219).

APPENDIX C.

3282. *Gross earnings for taxation.*—In like manner and with like powers, as provided by section 3 (3229) hereof, the public examiner, at least once a year, so far as practicable, shall visit all railroad and other corporations and companies which are required by law to pay taxes to the state upon a gross earnings basis, examine their books of account and all other records and papers bearing upon or evidencing their gross earnings upon which under the law, taxes should be paid in this state, and certify to the Minnesota tax commission the amount of such taxable earnings; and in case he shall discover errors and omissions in the gross earnings as reported by such companies, he shall certify the amount of such omitted earnings, together with the additional taxes and penalties due for collection as provided by law. All evasions and violations of the law in respect to such gross earnings taxes, which the public examiner may discover he shall report to the governor, the Minnesota tax commission and attorney-general, and said officials shall institute such proceedings as the law and the public interest require ('13 c. 555 S. 9) (3235).